72-1527

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1527

ROBERT BROWN,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term, 1972**

No.

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ROBERT BROWN,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.*

The Petitioner, Robert Brown prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on March 16th, 1973.

### A. The Opinion Below

There was an opinion by a panel of judges of the United States Court of Appeals for the Second Circuit, decided March 16th, 1973, and was attached as co-petitioner's Boulier's Appendix A., docketed in the Supreme Court of the United States under Docket Number 72-6486.

## B. Jurisdiction

The judgment of the Court of Appeals was entered on March 16th, 1973, and the jurisdiction of this Court is invoked under Rule 19, Title 28, United States Code, Section 1254(1). The Petitioner was granted an extension in which to file a Petition for Certiorari up to and including May 15th, 1973, by order of Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States.

## C. Questions Presented

1. Was it error to allow *hearsay* testimony to prove post conspiracy acts and declarations?

2. Was Brown denied a speedy trial, after specifically requesting such relief, in violation of his Sixth Amendment Rights of the United States Constitution.

3. Was there a failure of proof as to the knowledge of illegal importation of cocaine.

4. Was Brown denied a fair trial because the prosecutor questioned character witnesses concerning a 27 year old *arrest.*

## D. United States Constitution and Statutes

The United States Constitution, Fifth Amendment.

The United States Constitution, Sixth Amendment.

United States Code Title 21, Sections 173 and 174.

## E. Summary Statement of Matters Involved

The statement of facts are clearly set forth in the opinion of the Second Circuit Court of Appeals attached to co-petitioner's Boulier's Petition

## F. Reasons for Granting Writ

### POINT I

Co-Petitioner Brown adopts with full force and effect all arguments made by Co-Petitioner Rene Boulier in Point III of his Petition for Certiorari (72-6486) concerning post conspiracy evidence.

Brown also objected to the admission at trial of his business card, seized on September 14th, 1969 from co-conspirator Torrado and government witness Garland on unrelated charges. This arrest and seizure occurred over one year from the legal termination of the conspiracy. There was a phone number on the reverse of the card for a drug store near Petitioner Brown's record shop. The government did not prove a proper legal chain of custody from the time of the arrest until the admission of this card into Court, all of which deprived Brown of a fair trial. This Court should carefully review the doctrine set forth in *Lutwak* v. *U.S.*, 344 U.S. 604, and *Kotteakus* v. *U.S.* 328 U.S. 750, to clearly determine whether Petitioner Brown was denied due process of law.

## POINT II

**Petitioner Brown was denied a speedy trial and his motion to dismiss should have been granted.**

Brown was arrested in June, 1970, and released on bail along with seventeen other co-defendants and remained ready for trial at all times. The government does not argue that on a pre-trial conference on October 30, 1970, counsel for Brown specifically urged the judge to grant Brown "a speedy trial." Brown was prepared for trial March 1, 1971, which under all the circumstances, would have been consistent with his application for a speedy trial. The government, for some unknown reason, chose to appeal one of Judge Mishler's pre-trial rulings and the case was postponed indefinitely. This postponement was over strenuous objection. (See *U.S.* v. *Vega*, 458 2d 1234). The case against ten co-defendants was tried in June, 1971, after Brown was given a severance with specific instructions in open court that trial counsel for Brown was to advise the Court and the Assistant United States Attorney when he would have completed a Westchester County commitment and be prepared to try the case immediately thereafter. There is no dispute by the government nor by Judge Mishler that in July, 1971, the undersigned contacted both the United States Attorney's office and Judge Mishler and advised both of them that he was prepared for trial. There was no waiver of any speedy trial demand. In April of 1972, *before* the government ever placed this case on the calendar, Brown moved to dismiss the indictment because of the government's deliberate failure to prosecute. It was at that time, and at that time only, that the case was restored to the trial calendar and a trial date allegedly set up.

Nevertheless, when the United States Attorney advised the Court that they needed extra time, they were granted this postponement in order to "prepare their case".

In *Klopfer* v. *North Carolina*, 386 U.S. 215, the Court amplifies the defendant's rights under the Sixth Amendment of the United States Constitution and cites the fundamental fairness doctrine of *Twining* v. *New Jersey*, 211 U.S. 78 cited by Justice Black in *Duncan* v. *Louisiana*, 391 U.S. 161.

It is clear from the facts and circumstances of this case that if the government tried the case within the reasonable statutory period as outlined by the Judicial Conference and the rules of the Second Circuit, Brown would have, no doubt, been acquitted of these charges.

Garland's testimony was not available to the government at the prior trial. The government did not attempt to get a superceding indictment alleging the additional overt acts or offenses testified to by Garland. The specific prejudice in this case occurred in the complete testimony offered by Garland after the conspiracy ended, after the Petitioner was afforded his bill of particulars and prepared for trial, and after he demanded a speedy trial.

The United States Court of Appeals for the District of Columbia in *U.S.* v. *Dunn*, 459 F. 2d 1115, decided that an eighteen and one-half month delay between an arrest and trial is violative of the Sixth Amendment's guaranteed right to a speedy trial. There was no absolute requirement by the defendant *Dunn* to affirmatively ask for the speedy trial, although in this case, Brown affirmatively asked for a speedy trial, objected to a postponement on the ground that witnesses would not be available and the trial itself

showed extreme prejudice. The government here should be held responsible for the undue delay. This delay is both fundamentally unfair, was purposeful and oppressive on behalf of the government. In *Pollard* v. *U.S.*, 352 U.S. 354, the Court stated that "the essential ingredient is orderly expedititon and not mere speed", *Smith* v. *U.S.*, 360 U.S. 1; *U.S.* v. *Ewell*, 383 U.S. 116.

The Circuit Court's determination that both sides were partly responsible for the slow pace of the proceedings citing *Barker* v. *Wingo*, 407 U.S. 514, was made without a factual determination. It was Brown who moved to dismiss for failure to prosecute. It was Brown who sought a speedy trial. It was Brown who advised the Court in June, 1971 (a year before this trial) that he was ready to proceed. The government *did not* set forth an additional statement of readiness for Brown until after the motion to dismiss was made in April, 1972.

This Court should grant a Writ of Certiorari to clarify the conflicts between the Second Circuit Court of Appeals in this case and the Circuit Court of Appeals for the District of Columbia, *U. S.* v. *Dunn, Supra.*

## POINT III

**There was a failure of proof as to knowledge of illegal importation of cocaine as to petitioner Brown.**

The government's testimony alleged sales and deliveries of cocaine to Brown during the course of the conspiracy totalling less than a kilogram (101, 116, 573 R). The trial court ruled as a matter of law and so charged the jury, that the government must prove possesssion of one (1) kilogram

of cocaine during the term of the conspiracy. In contradiction to its own ruling, the court permitted evidence of alleged *post-conspiracy* sales to be *added* to the above amount so as to make up more than one (1) kilogram. The government was unable to show that Brown had possession of a half kilogram of cocaine or a kilogram of cocaine during the course of the conspiracy nor were they able to show through any direct testimony that Brown knew the narcotic drugs in question were illegally imported.

Brown could not have been in constructive possession of any narcotic drugs because there is no testimony that he was able to insure delivery to any other person, control prices or any other factors allowing an inference that he was in constructive possession of narcotic drugs as amplified in *United States* v. *Jones*, 308 F. 2d 26 and *United States* v. *Hernandez*, 290 F. 2d 86. There was a distinct opinion in *Gonzalez* v. *U.S.*, 442 F. 2d 698, interpreting *Turner* v. *U.S.*, 390 U.S. 398. In the *Gonzalez* case, there was no dispute that the defendants therein were actually in possession of at least one-half kilogram of cocaine or more. In this particular case, there is a dispute that Brown ever bought cocaine, let alone was ever in possession of the particular narcotic drugs. The same argument was made by co-defendant and prior appellant Sylvester Moore and decided adversely in *U.S.* v. *Vega*, 458 F. 2d 1234. However, in the *Vega* case, the facts indicate that Moore repeatedly dealt in the narcotic drugs and in a substantial amount of money (over thirty thousand dollars on one occasion and over forty thousand dollars on another occasion). Here, Petitioner Brown is only identified by Estrada as dealing in narcotic drugs on one and perhaps two occasions for the total sum of money of less than ten thousand dollars. If

the government claims that a kilogram of narcotic drugs sells for forty or fifty thousand dollars, then on the basis of their own valued theory, Brown *per se* must have been in possession of less than one-half kilogram of drugs and factually, the inferences drawn in *U.S.* v. *Vega, Supra* and *Turner* v. *U.S., Supra,* cannot be supported in this case.

The issues as to the amount of cocaine are intertwined with the post conspiracy acts and declarations offered in the government's direct case. Garland testified that in 1969 and in 1970 (about eighteen months after the termination of the conspiracy), Brown also allegedly received cocaine from Torrado. These were statements made by Torrado to Garland and repeated over objections. The jury could infer from Judge Mischler's charge that the cocaine mentioned by Garland after the conspiracy could be added up to arrive at the one kilo figure necessary in order to sustain a conviction. The overall unfairness which permeated this record, should cause this Court to grant a Petition for Certiorari.

## POINT IV

**It was prejudicial to admit evidence as to petitioner Brown's 1945 arrest.**

The introduction of a 1945 arrest of Brown for possession of a revolver and knife was prejudicial far beyond any legitimate value as to the credibility of the character witnesses, Mr. Granedy and Mrs. Bell.

On direct examination Granedy testified that he knew Brown for some twelve or fifteen years (R 1461) and Mrs. Bell knew Brown for some four or five years (R 1475). To question them about an arrest, not a conviction, but an

*arrest*, some twenty-seven years earlier (R 1468, 1478) can only go towards appellant's propensity to commit criminal acts.

It is respectfully suggested that the leading case on cross examination of character witnesses, *Michelson* v. *U.S.*, 335 U.S. 469, can and should be distinguished on a number of cogent grounds.

Technically, the court found an absence of specific objection; an opening of the door by the defendant's direct testimony as to a twenty year old conviction and the fact that two of the character witnesses knew the defendant for thirty years (R 484). None of these facts are applicable herein.

Legally, the Court found that "The crimes may be unlike, but both alike proceed from the same defects of character which the witnesses said this defendant was not reputed to exhibit", (R 483). The 1945 arrest for possession of a gun with no information as to its disposition, does not *per se* show a criminal character defect. This is highlighted by the fact that the character witness, Granedy, testified that guns were commonly kept by businessmen in that area and that his knowledge of the 1968 occurrence was that appellant turned in a gun under an amnesty arrangement and was not arrested (R 1467).

The introduction of Brown's 1968 arrest, if it was an arrest (R 1467), for possession of a gun, amply tested the knowledge and credibility of both character witnesses.

The Court did caution the jury that they should consider these arrests solely as to community opinion (R 1469, 1478). Taken in context with the tremendous mass of post-conspiracy testimony, however, the jury is confronted with

a defendant having an alleged criminal record from 1945 through 1971.

As argued earlier in this brief, it is utterly unrealistic to contend that the jury could and would so compartmentalize this 1945 arrest pursuant to the court's instructions, as to eliminate any substantial carry-over on the improper issue of propensity (*Osborne* v. *U.S.*, 351 F. 2d 111; 29 Am. Jur., p. 378) and in clear conflict with the rulings of the D.C. Circuit, *Shimon* v. *U.S.*, 352 F. 2d 449 and *U.S.* v. *Fox*, 473 F. 2d 131.

The Second Circuit Court of Appeals in *U.S.* v. *Puco*, 453 F. 2d 539, held that a defendant could not be impeached by cross-examination on a twenty-one year old *conviction.* The question here concerning an arrest of a youthful defendant (Brown was under 18 years of age in 1945), would bring forth every element of fundamental unfairness.

This Court in the interest of justice to clarify *U.S.* v. *Fox, Supra,* and the amplification of the *Michaelson* doctrine *Supra,* should grant a Writ of Certiorari.

## CONCLUSION

**The petition for certiorari should be granted and this Court in the exercise of its power should order the judgment of conviction reversed.**

Respectfully submitted,

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# APPENDIX

## Judgement of Affirmance of the United States Court of Appeals (Robert Brown)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March one thousand nine hundred and seventy-three.

Present:

HON. LEONARD P. MOORE
HON. PAUL R. HAYS
HON. WILFRED FEINBERG
Circuit Judges,

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WARNELL VEGA, a/k/a SKIPPY, PEDRO CAREW, a/k/a "CARUS", LEROY ALLEN, JESUS TORRADO, a/k/a CHUCHI, ANTONIO FLORES, a/k/a TONY FLORES, CARMEN RIVERA, GEORGE NATHAN, a/k/a GEORGE THE ITALIAN, BOBBY WYLER, a/k/a ROBERT WYLER, ROBERT BROWN, a/k/a SONNY, NELSON RIVERA, CLARANCE NASH, a/k/a CLEM NASH, LOUIS SILVA, MIGUEL SILVA, ORLANDO GURIDI, LOUIS GURIDI, GEORGE COLON, DALILAH R. REYS, RENE BOULIER, SYLVESTER MOORE, a/k/a "LIVE WIRE" MOORE, JOHN TIRADO, a/k/a JOHNNY DYNAMITE, JOHN DOE, a/k/a "STEVE",
Defendants,

GEORGE NATHAN, a/k/a GEORGE THE ITALIAN, ROBERT BROWN, a/k/a SONNY, CLARANCE NASH, a/k/a CLEM NASH, RENE BOULIER,
Defendants-Appellants.

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*Judgment of Affirmance of the United States Court of Appeals*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONISDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

Clerk

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1527

ROBERT BROWN,

*Petitioner,*

v.

UNITED STATES OF AMERICA

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**Opinion of the United States Court of Appeals**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 493, 495, 503, 504—September Term, 1972.

(Argued January 26, 1973 Decided March 16, 1973.)

Dockets Nos. 72-1895, 72-1905, 72-1999, 72-2038

UNITED STATES OF AMERICA,

*Appellee,*

—against—

GEORGE NATHAN, CLARENCE NASH, ROBERT BROWN and RENE BOULIER,

*Appellants.*

Before:

MOORE, HAYS and FEINBERG,

*Circuit Judges.*

Appeal from jury convictions in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, for conspiracy to receive and sell illegally imported narcotics in violation of former 21 U.S.C. §§ 173, 174.

Affirmed.

JESSE BERMAN, New York, N.Y. (Lawrence Stern, on the brief) *for Appellant Nathan.*

JOSEPH STONE, New York, N.Y., *for Appellants Brown, Boulier and Nash.*

RONALD E. DEPETRIS, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York; L. Kevin Sheridan, Assistant United States Attorney, on the brief) *for Appellee.*

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FEINBERG, *Circuit Judge:*

In August 1970, a one-count indictment was filed in the United States District Court for the Eastern District of New York, charging 21 defendants with conspiracy to violate the narcotics laws. 21 U.S.C. §§173, 174 (now 21 U.S.C. §§ 952, 960). The indictment also identified five co-conspirators who were not listed as defendants.[1] Eleven of those charged in the indictment were tried in 1971. Ten were found guilty, and this court affirmed their convictions. *United States* v. *Vega*, 458 F.2d 1234 (1972). In June 1972, the four defendants involved in this appeal—George Nathan, Robert Brown, Clarence Nash and Rene Boulier—were brought to trial on the same indictment before Chief Judge Jacob Mishler and a jury.[2]

The Government's case rested principally on the testimony of two co-conspirators. The jury could properly have found that the four appellants had worked for or dealt with a group headed by one Jesus Torrado, one of the 21 indicted and now a fugitive, who was based in New York City. Heroin and cocaine were imported into the country through Miami, and purchased there by Torrado's men.

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[1] Two of these co-conspirators testified for the prosecution in this case. The other three have been convicted in the United States District Court for the Southern District of Florida of violating 21 U.S.C. § 174.

[2] Of the remaining six defendants, five are fugitives and one has pleaded guilty to a separate charge.

They then brought the drugs to New York City and made sales to buyers in the city and elsewhere. Three of the four appellants were identified by Government witnesses as having purchased substantial quantities of narcotics from Torrado, apparently on a fairly regular basis. The fourth appellant—Rene Boulier—was described as a member of Torrado's organization, performing such tasks as preparation and delivery of heroin and cocaine. All four appellants were convicted, and they now appeal on divers grounds.[3]

## I. Double Jeopardy and a Prosecutorial Promise

The most substantial argument raised on appeal is based upon legal proceedings that took place in the United States District Court for the Southern District of Florida. Appellant Boulier was indicted there with 12 others on October 14, 1969 for his role in a drug importation and distribution conspiracy. Seven or eight of the 36 participants named in the Florida indictment were also identified as co-conspirators in the instant indictment in New York, which was filed ten months later. On December 20, 1971, a superseding information was filed in the Florida court, charging that Boulier, together with three named individuals (two of whom had also been named in the New York indictment), and others unknown, had conspired to violate 26 U.S.C. § 4704(a) by purchasing and selling heroin not in or from the original stamped package. Boulier pleaded guilty to the information, and the original Florida indictment was dismissed.

Boulier asserts that his guilty plea to the federal information in Florida precluded his conviction under the New

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[3] Appellant George Nathan was sentenced to 15 years in prison and a $20,000 fine. The other three appellants each recived a prison term of ten years and a fine of $10,000.

York indictment by operation of the Double Jeopardy Clause. Judge Mishler rejected this claim, concluding that the conspiracy alleged in the information was separate from and not merely one component of the conspiracy described in the New York indictment.

We need not decide whether the two conspiracies charged were identical in fact.[4] It is sufficient to observe that the two convictions were based upon different statutory violations; the second, unlike the first, required a showing of defendant's knowledge of illegal importation.[5] That a defendant may be punished for multiple violations of the narcotics laws arising from a single transaction is well settled, see *Gore* v. *United States*, 357 U.S. 386 (1957);[6] and

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[4] Based upon the facts presented to us, this would appear to be a close question. See *United States* v. *Wilshire Oil Co.*, 427 F.2d 969, 976n. 12 (10th Cir.), cert. denied, 400 U.S. 829 (1970) (defendant must establish such identity by a preponderance of the evidence). It is true that the two conspiracies overlap in time (the Florida information alleged a conspiracy lasting from April 15, 1968 to October 23, 1969; the New York indictment charged a conspiracy that continued from January through August 1968), that two of Boulier's three co-conspirators named in the Florida information also were identified as participants in the conspiracy at issue here, and that the criminal activity in both conspiracies involved distribution of narcotics. But these common elements in themselves do not necessarily establish a double jeopardy violation. See *United States* v. *Barzie*, 433 F.2d 984 (2d Cir. 1970) (per curiam), cert. denied, 401 U.S. 975 (1971). More serious, however, is the Government's admission that one of the two overt acts alleged in the information—apparently the more serious one—"may well be the same as" one of the acts listed in the New York indictment. Moreover, and perhaps most significantly, the testimony of the government agent offered at the Florida hearing to test the basis for Boulier's guilty plea described the conspiracy there charged in terms that at least suggest that it may be the same as the conspiracy here in question.

[5] Such knowledge is required under 21 U.S.C. § 174, see *United States* v. *Aqueci*, 310 F.2d 817, 824-26 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963), although in certain situations it can be established by inference based upon possession. See part IV infra.

[6] The Court in *Gore* decided this question on both constitutional and legislative grounds.

we are not aware of any constitutional requirement that all such violations must be tried together. See, e.g., *United States* v. *Jones*, 334 F.2d 809, 811 (7th Cir. 1964), cert. denied, 379 U.S. 993 (1965).[7]

Boulier advances another argument based upon the Florida proceedings. The supersession of the original indictment by the information and Boulier's guilty plea were the outgrowth of an agreement between the federal prosecutor in the Southern District of Florida and Boulier's attorney. Under this agreement, Boulier was to provide federal authorities with information concerning the sale and distribution of narcotics in the United States and Latin America. In exchange, the indictment would be dismissed, Boulier would plead guilty to the lesser charge in the information,[8] and would receive probation. In addition, the

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[7] This situation is to be distinguished from the one dealt with in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), cited by appellant. In that case, six men had been robbed while participating in a poker game. Ashe was tried for robbing one of the victims and was acquitted. He was then tried for robbing another of the players and was convicted. The Supreme Court reversed on the ground that the first jury had determined that Ashe had not participated in the robbery, a necessary element in the conviction by the second jury. In a concurring opinion in *Ashe*, id. at 448, as well as in a separate opinion in *Abbate* v. *United States*, 359 U.S. 187, 196 (1959), Justice Brennan urged the Court to decide that all violations growing out of a single transaction must be tried together. While this may frequently be the preferable practice, see *United States* v. *Jones*, supra, 334 F.2d at 812, it has not been held to be required by the Double Jeopardy Clause so long as the proscription of *Ashe* is not transgressed. See, e.g., *United States* v. *DeMarrias*, 441 F.2d 1304 (8th Cir. 1971). See generally Comment, *Ashe* v. *Swenson*: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts, 71 Colum. L. Rev. 321 (1971).

[8] The original indictment charged a conspiracy to violate former 21 U.S.C. § 174, punishable by a minimum sentence of five years in prison. The information charged a conspiracy under 18 U.S.C. § 371 to violate 26 U.S.C. § 4704(a), which did not preclude the possibility of probation.

United States Attorney in that district apparently assured Boulier that the Government would agree to the dismissal of the indictment pending in the Eastern District of New York. Based upon the latter promise, which was obviously never carried out, Boulier urges that the Government should be estopped from prosecuting him in this proceeding. We put to one side such questions as the authority of one United States Attorney to bind another or the proper remedy for a defendant who has been deceived by such a promise. The record indicates that Boulier failed to carry out his part of the bargain by refusing to disclose the promised information and hence is in no position to invoke the agreement now.[9]

## II. Evidence of Later Crimes

All four appellants challenge the introduction of evidence of a series of post-conspiracy transactions and, in the case of George Nathan, two arrests for possession of cocaine. As to the former argument, evidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of the alleged conspirator. *Lutwak* v. *United States*, 344 U.S. 604, 617-19 (1953); *United States* v. *Bennett*, 409 F.2d 888, 893 (2d Cir.), cert. denied, 396 U.S. 852 (1969).[10] Hence the prosecution could properly introduce evidence that appellants had, on a number of occasions after August

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[9] Following Boulier's failure to provide the information, the Florida prosecutor recommended a three-year sentence on his guilty plea, and Judge Joe Eaton sentenced him to two years in prison.

[10] Judge Mishler carefully instructed the jury as to the limited purpose for which such evidence could be used.

1968, engaged in drug transactions and other activities that usually accompany such criminal conduct.[11]

Appellant George Nathan specifically complains about the Government's use of rebuttal testimony by two police officers, who described the circumstances of Nathan's two post-conspiracy arrests on drug charges. Neither arrest led to a conviction, and Nathan asserts that they should not have been used against him by means of extrinsic proof. However, appellant opened the door to such an inquiry through his own testimony. On direct examination he declared that he did not use cocaine or heroin and had never engaged in the transportation or distribution of any narcotic drug; on cross-examination, while admitting the two arrests, he denied that he had possessed narcotics at the time of his second arrest or that he had known of the presence of drugs in his apartment at his first arrest. The testimony of the officers suggested the strong likelihood that Nathan had in fact been knowingly in possession of cocaine on both occasions, and the trial judge could therefore, in his discretion, admit such testimony to disprove Nathan's assertions. See *Walder* v. *United States*, 347 U.S. 62 (1954); *United States* v. *Keilly*, 445 F.2d 1285, 1289 (2d Cir. 1971), cert. denied, 406 U.S. 962 (1972) (limiting *United States* v. *Glasser*, 443 F.2d 994 (2d Cir.), cert. denied, 404 U.S. 854 (1971)).

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[11] The related activities consisted of exchanging or transferring large sums of cash.

In a separate argument appellants urge that there was a fatal variance between the indictment and the proof. In substance, however, this point is merely a variation of their argument against the introduction of evidence of post-conspiracy conduct, and it has no merit.

## III. Brown's Business Card and His 1945 Arrest

At trial, the Government introduced into evidence a business card of appellant Robert Brown, who owned a record store. Brown challenges the admission of the card as unwarrantedly prejudicial.[12] The card in question had been taken from Jesus Torrado's apartment when he was arrested. The relevance of the card is that it served as circumstantial evidence of Brown's involvement with Torrado and the conspiracy. Used for this purpose, introduction of the card was proper. See *United States* v. *Canieso*, slip op. 615, 628 (2d Cir. November 22, 1972); *United States* v. *Armone*, 363 F.2d 385, 403-04 (2d Cir.), cert. denied, 385 U.S. 957 (1966).

Brown called three character witnesses to vouch for his reputation for veracity. On cross-examination, two of them were asked whether they were aware that Brown had been arrested in 1945 for possession of a knife and a revolver and in 1968 for possession of a dangerous weapon. Brown claims that the reference to the earlier arrest was improper because of its remoteness and its tenuous relationship to his veracity. We doubt whether knowledge of such an ancient event of this nature is a prerequisite for a reliable accounting of a defendant's reputation for honesty in the community. Cf. *United States* v. *Puco*, 453 F.2d 539, 543 (2d Cir. 1971) (impeachment of defendant on cross-examination by 21-year old conviction held improper). However, at trial Brown did not specify the grounds now asserted to exclude evidence of the 1945 arrest. See *United*

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[12] He also argues that the card should have been excluded because the Government did not establish a chain of custody. This claim is without merit since the agent who had seized the card had written an identifying number on it, which he recognized at trial.

*States* v. *Silverman*, 430 F.2d 106, 125-26 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). In addition, he did not object to the much more damaging reference to the 1968 arrest. In view of these circumstances and the trial court's very broad discretion as to the permissible scope of cross-examination of character witnesses to test the basis for their statements, see *Michelson* v. *United States*, 335 U.S. 469 (1948), Brown has not made a "clear showing of prejudicial abuse of discretion." Id. at 480.

## IV. Speedy Trial and Sufficiency Claims

Appellant Brown was arrested in June 1970 and indicted in New York two months later. He was not tried until June 1972 and urges that the indictment should have been dismissed, as he requested below, because this delay deprived him of his right to a speedy trial. We disagree.

Although the gap between arrest and trial was two years, there apparently was no purposeful delay and both sides were partly responsible for the slow pace of the proceedings. See *Barker* v. *Wingo*, 407 U.S. 514, 531 (1972). Most significantly, Brown had been scheduled to go to trial in June 1971 with the first group of alleged conspirators, but he requested a severance, which, when granted, led to a substantial delay. Moreover, he demonstrates no constitutionally cognizable prejudice.[13] See id. at 532. Finally, we note that since the Government was ready for trial in June 1971, there was no violation of this circuit's Rules Regarding Prompt Disposition of Criminal Cases, which went into effect shortly thereafter.[14]

[13] Brown claims only that the delay permitted the Government to call an additional witness. He does not allege that his own preparation was hampered. Moreover, he was free on bail during the two-year period.

Appellants Brown and Nash argue that the Government failed to establish—as it must under section 174, see *United States* v. *Aqueci*, supra note 5—that they knew that the drugs in question had been illegally imported. This argument ignores the evidence that both appellants were at various times in possession of quantities of heroin. As Judge Mishler charged, this is sufficient to justify an inference that they were aware that it had been illegally imported. See, e.g., *Turner* v. *United States*, 396 U.S. 398, 408-18 (1970).[15]

## V. Miscellaneous Contentions

Finally, appellants offer a number of additional reasons for reversal, including the prosecutor's assertedly prejudicial summation, allegedly improper venue in the Eastern District, and the discovery of "new" evidence with regard to appellant Nash. On the first point, we find that the challenged prosecutorial remarks, when placed in context, are for the most part unobjectionable and that such error as may have occurred was of minor significance. As to venue, the use by the conspirators of John F. Kennedy International Airport for flights to Miami and Detroit to obtain or sell narcotics was a sufficient basis for venue to lie in the Eastern District.[16] With regard to the third

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[15] With respect to cocaine, Judge Mishler charged that an inference of knowledge may be drawn from the proven possession of at least one kilo of the substance during the pendency of the conspiracy. See *United States* v. *Gonzalez*, 442 F.2d 698, 705, 709 (2d Cir.) (en banc), cert. denied, 404 U.S. 845 (1971).

[16] Two such flights were listed in the indictment and proved as overt acts in furtherance of the conspiracy.

point, the evidence in question—hospital and doctor's records showing that Nash had been hospitalized for a few days in late July 1969—would have been of little or no help to appellant's case[17] and, in any event, could have been sought during the pendency of the trial.[18] We have considered the other points raised by appellants, but none warrants further discussion.

**Affirmed.**

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[17] A government witness, Stanton Garland, testified that in "[t]he latter part of July 1969" he saw Nash hand $17,000 to Nash's father (named in the indictment as a co-conspirator), who in turn gave the money to Jesus Torrado, presumably in payment for narcotics. The fact that Nash was in the hospital for a few days in late July scarcely amounts to a refutation of the testimony in question.

[18] A recess of five days was called after Garland had testified. Thus, Nash had ample opportunity to obtain the records when he was already aware of their arguable relevance to the Government's case against him.

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Supreme Court, U. S.
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MAY 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1531

CLARENCE NASH,

*Petitioner,*

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term, 1972**

**No.**

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CLARENCE NASH,

*Petitioner,*

v.

UNITED STATES OF AMERICA

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To:

THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioner, CLARENCE NASH prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on March 16th, 1973.

### A. The Opinion Below

There was an opinion by a panel of judges of the United States Court of Appeals for the Second Circuit, decided March 16th, 1973, and was attached as co-petitioner's Boulier's Appendix A., docketed in the Supreme Court of the United States under Docket Number 72-6486.

## B. Jurisdiction

The judgment of the Court of Appeals was entered on March 16th, 1973, and the jurisdiction of this Court is invoked under Rule 19, Title 28, United States Code, Section 1254 (1). The Petitioner was granted an extension in which to file a Petition for Certiorari up to and including May 15th, 1973, by order of Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States.

## C. Questions Presented

1. Was it error to allow *hearsay* testimony to prove post conspiracy acts and declarations?

2. Was Nash denied due process of law, and a speedy trial, because of the death of his lawyer, in violation of his Sixth Amendment Rights of the United States Constitution?

3. Was there a failure of proof as to the knowledge of illegal importation of cocaine?

4. Was it error of the Court to deny Nash a new trial pursuant to Rule 33?

## D. United States Constitution and Statutes

The United States Constitution, Fifth Amendment; The United States Constitution, Sixth Amendment; United States Code Title 21, Sections 173 and 174.

## E. Summary Statement of Matters Involved

The statement of facts are clearly set forth in the opinion of the Second Circuit Court of Appeals attached to co-petitioner's Boulier's Petition, bearing Docket No. 72-6486.

## F. Reasons for Granting Writ

### POINT I

Co-Petitioner Nash adopts with full force and effect all arguments made by Co-Petitioner Rene Boulier in Point III of his Petition for Certiorari (72-6486) and Point I of co-petitioner Brown.

Nash also objected to the post-conspiracy testimony of Stanton Garland concerning the counting of money and the delivery of money, allegedly from the proceeds of narcotic transactions. Garland's testimony indicated that the alleged transfer of money took place in approximately the last week of July, 1969. Shortly after the verdict, Nash moved for a new trial, on the basis of newly discovered evidence. (Point IV of the Petition.)

All of the post-conspiracy acts and declarations forced Nash to defend himself at the last minute with a new attorney (Point II) and completely surprised him of all the intricate charges facing him.

This Court should grant the Petitioner a Writ of Certiorari to cure the manifest injustices that were occasioned throughout this trial.

## POINT II

**Petitioner Nash was deprived of a speedy trial and an ample opportunity to obtain counsel of his choice under the Sixth Amendment of the United States Constitution.**

The Petitioner Nash was arrested June, 1970 in Detroit, Michigan and released on bail. He retained a New York attorney, William Kelly, Esq. The trial was set for March 1st, 1971 and was adjourned because of the illness of Mr. Kelly. Nash was granted a severance and was told that he would be notified very shortly. Nash was never notified of any trial schedule until April, 1972, (13 months later) when he was advised that Mr. Kelly had died and that he must obtain other counsel and proceed to trial immediately.

The government failed to place this case on any Court calendar, so that Nash could have been advised as to the death of Mr. Kelly, nor did Nash receive any notice from any members of Mr. Kelly's firm.

Because of Mr. Kelly's youth and untimely death, the trial Judge, did not want to involve Nash in making a claim against Mr. Kelly's estate, and suggested that Mr. Kelly's firm defend the case, giving Mr. Nash credit for the fees already paid to Mr. Kelly.

Nash agreed and Mr. James LaRosa, an associate and/or partner of Mr. Kelly agreed to take over the representation of Mr. Nash.

After Brown moved for a dismissal because of the government's failure to prosecute, Mr. LaRosa notified the Court that he was too busy when the case was re-scheduled

and the Court directed that Aaron Schacher, Esq. represent Mr. Nash either on an assigned basis or as retained counsel.

Mr. LaRosa, an eminent attorney, and more familiar with the file than was Mr. Schacher was relieved.

Mr. Schacher was then obligated to defend the case at the very last minute, and Nash was deprived of a speedy trial because of the untimely death of his attorney, without notice to him while the government was aware of Mr. Kelly's demise.

This Court should grant a Writ of Certiorari to determine whether or not the government failed to guarantee Nash's Sixth Amendment right to counsel of his choosing and in effect denied him a speedy trial.

Petitioner Nash adopts all other legal arguments made by co-petitioner Brown in Point II of Brown's petition concerning these issues.

## POINT III

**There was a failure of proof as to knowledge of illegal importation of cocaine as to petitioner Nash.**

The government's evidence alleged joint possession by Nash and his father (Mooky Jackson) of cocaine and heroin during the course of the conspiracy. The government elected on the same set of facts and circumstances to indict the father in the Florida conspiracy case and indict the son in the New York conspiracy case, even though both are effectively charged with committing the same acts in furtherance of the same conspiracy.

This effectively pits father against son, and son against father and both are compelled to defend themselves in two distant jurisdictions. (Both Nash and Jackson are alleged to be residents of Detroit, Michigan). There is no direct proof that Nash knew the packages allegedly transferred by Gomez to his father contained narcotics, therefore, the government could not avail themselves of the statutory presumption, and furthermore there is no direct proof that Nash was in constructive possession of any narcotic drugs because there is a lack of testimony that he was able to insure delivery to any other person, control prices or any other factors allowing an inference to be drawn that he was in constructive possession of narcotic drugs. *U. S.* v. *Jones*, 308 F 2d 26, *U.S.* v. *Hernandez*, 290 F 2d 86, and *Turner* v. *U.S.*, 390 U.S. 398.

The sins of a father may be passed on to a son, but a statutory inference cannot be drawn against both the father and the son in separate jurisdictions and in separate indictments, using the same narcotic evidence against both defendants.

This Court in the interest of justice should grant a Writ of Certiorari.

## POINT IV

**It was a violation of due process to deny Nash a new trial.**

Petitioner Nash was first faced with the problem of defending himself in a complicated multi-defendant conspiracy indictment in New York City, when he was a resident of Detroit. He first obtained a New York attor-

ney, and attempted, through his attorney, to obtain certain particulars concerning the charges in the indictment. After the death of his attorney (unknown to him Point II), Nash was then compelled to proceed to trial with a lawyer who was *not* the original lawyer of his choice. This lawyer was then compelled to defend the case with very little notice and was obliged to review the record of the original trial of the other severed defendants, (*U.S.* v. *Vega*, 458 F 2d 1234). Any attorney who could read would then be aware that the indictment claimed that the conspiracy ended in August of 1968, and upon reading the record will find the Judge so charged the jury that the indictment ended, AS A MATTER OF LAW, in 1968. The testimony of the first Vega trial in New York and of the Florida trial, indicated that Nash was to defend himself for certain events prior to the termination of the indictment. However, when he arrived in Court, his new attorney was confronted with post-conspiracy acts and declarations of a hearsay nature (Point I), which occurred twelve, fourteen, and sixteen months after the indictment. One of the most severe post-conspiracy acts charged against Nash was that in July (and specifically the last week of July) 1969, when Stanton Garland allegedly transferred money from Nash for a narcotics transaction. Cross-examination was extensive to try to pinpoint Garland concerning the exact date when this money was transferred. Garland testified in Court on or about June 29th, 1972. The Court of Appeals found that there was a five day recess between June 29th, 1972, and July 5th, 1972. Their calendar calculation was correct, however, this did not alleviate the fact that Nash was still deprived of certain procedural rights in defending himself in this difficult case. At the conclusion of the trial, Nash

through his attorney, Aaron Schacher offered in support of a motion, pursuant to Rule 33, certain newly discovered evidence, i.e. hospital records indicating that Nash was a victim of a gun shot wound in the last week of July, 1969, and was in a Detroit Hospital. The Circuit Court in affirming the District Court stated that Nash could have obtained these records during the recess. The Court ignored the fact that this was a holiday week-end when Hospital Record Offices were probably as active as government offices and had Nash even tried to obtain the hospital records during the period of time, he would have been unable to do so. The credibility of Garland was a major issue in sustaining the conviction of Petitioner Nash. The overall prejudice which permeated this record should cause this Court to grant Petitioner Nash a Writ of Certiorari.

## CONCLUSION

**The petition for certiorari should be granted and this Court in the exercise of its power should order the judgment of conviction reversed.**

Respectfully submitted,

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# APPENDIX

## Judgement of Affirmance of the United States Court of Appeals (Clarence Nash)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March one thousand nine hundred and seventy-three.

Present:

HON. LEONARD P. MOORE
HON. PAUL R. HAYS
HON. WILFRED FEINBERG
Circuit Judges,

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WARNELL VEGA, a/k/a SKIPPY, PEDRO CAREW, a/k/a "CARUS", LEROY ALLEN, JESUS TORRADO, a/k/a CHUCHI, ANTONIO FLORES, a/k/a TONY FLORES, CARMEN RIVERA, GEORGE NATHAN, a/k/a GEORGE THE ITALIAN, BOBBY WYLER, a/k/a ROBERT WYLER, ROBERT BROWN, a/k/a SONNY, NELSON RIVERA, CLARANCE NASH, a/k/a CLEM NASH, LOUIS SILVA, MIGUEL SILVA, ORLANDO GURIDI, LOUIS GURIDI, GEORGE COLON, DALILAH R. REYS, RENE BOULIER, SYLVESTER MOORE, a/k/a "LIVE WIRE" MOORE, JOHN TIRADO, a/k/a JOHNNY DYNAMITE, JOHN DOE, a/k/a "STEVE",
Defendants,

GEORGE NATHAN, a/k/a GEORGE THE ITALIAN, ROBERT BROWN, a/k/a SONNY, CLARANCE NASH, a/k/a CLEM NASH, RENE BOULIER,
Defendants-Appellants.

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*Judgment of Affirmance of the United States Court of Appeals*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONISDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

Clerk

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Supreme Court, U.S.
FILED
MAY 24 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1972**

**No. 72-1531**

CLARENCE NASH,

*Petitioner,*

v.

UNITED STATES OF AMERICA

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 493, 495, 503, 504—September Term, 1972.

(Argued January 26, 1973 Decided March 16, 1973.)

Dockets Nos. 72-1895, 72-1905, 72-1999, 72-2038

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

GEORGE NATHAN, CLARENCE NASH, ROBERT BROWN and RENE BOULIER,

*Appellants.*

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Before:

MOORE, HAYS and FEINBERG,

*Circuit Judges.*

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Appeal from jury convictions in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, for conspiracy to receive and sell illegally imported narcotics in violation of former 21 U.S.C. §§ 173, 174.

Affirmed.

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JESSE BERMAN, New York, N.Y. (Lawrence Stern, on the brief) *for Appellant Nathan.*

JOSEPH STONE, New York, N.Y., *for Appellants Brown, Boulier and Nash.*

*Opinion of the United States Court of Appeals*

RONALD E. DEPETRIS, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York; L. Kevin Sheridan, Assistant United States Attorney, on the brief) *for Appellee.*

---

FEINBERG, *Circuit Judge:*

In August 1970, a one-count indictment was filed in the United States District Court for the Eastern District of New York, charging 21 defendants with conspiracy to violate the narcotics laws. 21 U.S.C. §§173, 174 (now 21 U.S.C. §§ 952, 960). The indictment also identified five co-conspirators who were not listed as defendants.[1] Eleven of those charged in the indictment were tried in 1971. Ten were found guilty, and this court affirmed their convictions. *United States* v. *Vega*, 458 F.2d 1234 (1972). In June 1972, the four defendants involved in this appeal—George Nathan, Robert Brown, Clarence Nash and Rene Boulier—were brought to trial on the same indictment before Chief Judge Jacob Mishler and a jury.[2]

The Government's case rested principally on the testimony of two co-conspirators. The jury could properly have found that the four appellants had worked for or dealt with a group headed by one Jesus Torrado, one of the 21 indicted and now a fugitive, who was based in New York City. Heroin and cocaine were imported into the country through Miami, and purchased there by Torrado's men.

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[1] Two of these co-conspirators testified for the prosecution in this case. The other three have been convicted in the United States District Court for the Southern District of Florida of violating 21 U.S.C. § 174.

[2] Of the remaining six defendants, five are fugitives and one has pleaded guilty to a separate charge.

They then brought the drugs to New York City and made sales to buyers in the city and elsewhere. Three of the four appellants were identified by Government witnesses as having purchased substantial quantities of narcotics from Torrado, apparently on a fairly regular basis. The fourth appellant—Rene Boulier—was described as a member of Torrado's organization, performing such tasks as preparation and delivery of heroin and cocaine. All four appellants were convicted, and they now appeal on divers grounds.[3]

## I. Double Jeopardy and a Prosecutorial Promise

The most substantial argument raised on appeal is based upon legal proceedings that took place in the United States District Court for the Southern District of Florida. Appellant Boulier was indicted there with 12 others on October 14, 1969 for his role in a drug importation and distribution conspiracy. Seven or eight of the 36 participants named in the Florida indictment were also identified as co-conspirators in the instant indictment in New York, which was filed ten months later. On December 20, 1971, a superseding information was filed in the Florida court, charging that Boulier, together with three named individuals (two of whom had also been named in the New York indictment), and others unknown, had conspired to violate 26 U.S.C. § 4704(a) by purchasing and selling heroin not in or from the original stamped package. Boulier pleaded guilty to the information, and the original Florida indictment was dismissed.

Boulier asserts that his guilty plea to the federal information in Florida precluded his conviction under the New

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[3] Appellant George Nathan was sentenced to 15 years in prison and a $20,000 fine. The other three appellants each recived a prison term of ten years and a fine of $10,000.

York indictment by operation of the Double Jeopardy Clause. Judge Mishler rejected this claim, concluding that the conspiracy alleged in the information was separate from and not merely one component of the conspiracy described in the New York indictment.

We need not decide whether the two conspiracies charged were identical in fact.[4] It is sufficient to observe that the two convictions were based upon different statutory violations; the second, unlike the first, required a showing of defendant's knowledge of illegal importation.[5] That a defendant may be punished for multiple violations of the narcotics laws arising from a single transaction is well settled, see *Gore* v. *United States*, 357 U.S. 386 (1957);[6] and

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[4] Based upon the facts presented to us, this would appear to be a close question. See *United States* v. *Wilshire Oil Co.*, 427 F.2d 969, 976n. 12 (10th Cir.), cert. denied, 400 U.S. 829 (1970) (defendant must establish such identity by a preponderance of the evidence). It is true that the two conspiracies overlap in time (the Florida information alleged a conspiracy lasting from April 15, 1968 to October 23, 1969; the New York indictment charged a conspiracy that continued from January through August 1968), that two of Boulier's three co-conspirators named in the Florida information also were identified as participants in the conspiracy at issue here, and that the criminal activity in both conspiracies involved distribution of narcotics. But these common elements in themselves do not necessarily establish a double jeopardy violation. See *United States* v. *Barzie*, 433 F.2d 984 (2d Cir. 1970) (per curiam), cert. denied, 401 U.S. 975 (1971). More serious, however, is the Government's admission that one of the two overt acts alleged in the information—apparently the more serious one—"may well be the same as" one of the acts listed in the New York indictment. Moreover, and perhaps most significantly, the testimony of the government agent offered at the Florida hearing to test the basis for Boulier's guilty plea described the conspiracy there charged in terms that at least suggest that it may be the same as the conspiracy here in question.

[5] Such knowledge is required under 21 U.S.C. § 174, see *United States* v. *Aqueci*, 310 F.2d 817, 824-26 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963), although in certain situations it can be established by inference based upon possession. See part IV infra.

[6] The Court in *Gore* decided this question on both constitutional and legislative grounds.

we are not aware of any constitutional requirement that all such violations must be tried together. See, e.g., *United States* v. *Jones*, 334 F.2d 809, 811 (7th Cir. 1964), cert. denied, 379 U.S. 993 (1965).[7]

Boulier advances another argument based upon the Florida proceedings. The supersession of the original indictment by the information and Boulier's guilty plea were the outgrowth of an agreement between the federal prosecutor in the Southern District of Florida and Boulier's attorney. Under this agreement, Boulier was to provide federal authorities with information concerning the sale and distribution of narcotics in the United States and Latin America. In exchange, the indictment would be dismissed, Boulier would plead guilty to the lesser charge in the information,[8] and would receive probation. In addition, the

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[7] This situation is to be distinguished from the one dealt with in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), cited by appellant. In that case, six men had been robbed while participating in a poker game. Ashe was tried for robbing one of the victims and was acquitted. He was then tried for robbing another of the players and was convicted. The Supreme Court reversed on the ground that the first jury had determined that Ashe had not participated in the robbery, a necessary element in the conviction by the second jury. In a concurring opinion in *Ashe*, id. at 448, as well as in a separate opinion in *Abbate* v. *United States*, 359 U.S. 187, 196 (1959), Justice Brennan urged the Court to decide that all violations growing out of a single transaction must be tried together. While this may frequently be the preferable practice, see *United States* v. *Jones*, supra, 334 F.2d at 812, it has not been held to be required by the Double Jeopardy Clause so long as the proscription of *Ashe* is not transgressed. See, e.g., *United States* v. *DeMarrias*, 441 F.2d 1304 (8th Cir. 1971). See generally Comment, *Ashe* v. *Swenson*: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts, 71 Colum. L. Rev. 321 (1971).

[8] The original indictment charged a conspiracy to violate former 21 U.S.C. § 174, punishable by a minimum sentence of five years in prison. The information charged a conspiracy under 18 U.S.C. § 371 to violate 26 U.S.C. § 4704(a), which did not preclude the possibility of probation.

United States Attorney in that district apparently assured Boulier that the Government would agree to the dismissal of the indictment pending in the Eastern District of New York. Based upon the latter promise, which was obviously never carried out, Boulier urges that the Government should be estopped from prosecuting him in this proceeding. We put to one side such questions as the authority of one United States Attorney to bind another or the proper remedy for a defendant who has been deceived by such a promise. The record indicates that Boulier failed to carry out his part of the bargain by refusing to disclose the promised information and hence is in no position to invoke the agreement now.[9]

## II. Evidence of Later Crimes

All four appellants challenge the introduction of evidence of a series of post-conspiracy transactions and, in the case of George Nathan, two arrests for possession of cocaine. As to the former argument, evidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of the alleged conspirator. *Lutwak* v. *United States*, 344 U.S. 604, 617-19 (1953); *United States* v. *Bennett*, 409 F.2d 888, 893 (2d Cir.), cert. denied, 396 U.S. 852 (1969).[10] Hence the prosecution could properly introduce evidence that appellants had, on a number of occasions after August

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[9] Following Boulier's failure to provide the information, the Florida prosecutor recommended a three-year sentence on his guilty plea, and Judge Joe Eaton sentenced him to two years in prison.

[10] Judge Mishler carefully instructed the jury as to the limited purpose for which such evidence could be used.

1968, engaged in drug transactions and other activities that usually accompany such criminal conduct.[11]

Appellant George Nathan specifically complains about the Government's use of rebuttal testimony by two police officers, who described the circumstances of Nathan's two post-conspiracy arrests on drug charges. Neither arrest led to a conviction, and Nathan asserts that they should not have been used against him by means of extrinsic proof. However, appellant opened the door to such an inquiry through his own testimony. On direct examination he declared that he did not use cocaine or heroin and had never engaged in the transportation or distribution of any narcotic drug; on cross-examination, while admitting the two arrests, he denied that he had possessed narcotics at the time of his second arrest or that he had known of the presence of drugs in his apartment at his first arrest. The testimony of the officers suggested the strong likelihood that Nathan had in fact been knowingly in possession of cocaine on both occasions, and the trial judge could therefore, in his discretion, admit such testimony to disprove Nathan's assertions. See *Walder* v. *United States*, 347 U.S. 62 (1954); *United States* v. *Keilly*, 445 F.2d 1285, 1289 (2d Cir. 1971), cert. denied, 406 U.S. 962 (1972) (limiting *United States* v. *Glasser*, 443 F.2d 994 (2d Cir.), cert. denied, 404 U.S. 854 (1971)).

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[11] The related activities consisted of exchanging or transferring large sums of cash.

In a separate argument appellants urge that there was a fatal variance between the indictment and the proof. In substance, however, this point is merely a variation of their argument against the introduction of evidence of post-conspiracy conduct, and it has no merit.

## III. Brown's Business Card and His 1945 Arrest

At trial, the Government introduced into evidence a business card of appellant Robert Brown, who owned a record store. Brown challenges the admission of the card as unwarrantedly prejudicial.[12] The card in question had been taken from Jesus Torrado's apartment when he was arrested. The relevance of the card is that it served as circumstantial evidence of Brown's involvement with Torrado and the conspiracy. Used for this purpose, introduction of the card was proper. See *United States* v. *Canieso*, slip op. 615, 628 (2d Cir. November 22, 1972); *United States* v. *Armone*, 363 F.2d 385, 403-04 (2d Cir.), cert. denied, 385 U.S. 957 (1966).

Brown called three character witnesses to vouch for his reputation for veracity. On cross-examination, two of them were asked whether they were aware that Brown had been arrested in 1945 for possession of a knife and a revolver and in 1968 for possession of a dangerous weapon. Brown claims that the reference to the earlier arrest was improper because of its remoteness and its tenuous relationship to his veracity. We doubt whether knowledge of such an ancient event of this nature is a prerequisite for a reliable accounting of a defendant's reputation for honesty in the community. Cf. *United States* v. *Puco*, 453 F.2d 539, 543 (2d Cir. 1971) (impeachment of defendant on cross-examination by 21-year old conviction held improper). However, at trial Brown did not specify the grounds now asserted to exclude evidence of the 1945 arrest. See *United*

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[12] He also argues that the card should have been excluded because the Government did not establish a chain of custody. This claim is without merit since the agent who had seized the card had written an identifying number on it, which he recognized at trial.

*States* v. *Silverman*, 430 F.2d 106, 125-26 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). In addition, he did not object to the much more damaging reference to the 1968 arrest. In view of these circumstances and the trial court's very broad discretion as to the permissible scope of cross-examination of character witnesses to test the basis for their statements, see *Michelson* v. *United States*, 335 U.S. 469 (1948), Brown has not made a "clear showing of prejudicial abuse of discretion." Id. at 480.

## IV. Speedy Trial and Sufficiency Claims

Appellant Brown was arrested in June 1970 and indicted in New York two months later. He was not tried until June 1972 and urges that the indictment should have been dismissed, as he requested below, because this delay deprived him of his right to a speedy trial. We disagree.

Although the gap between arrest and trial was two years, there apparently was no purposeful delay and both sides were partly responsible for the slow pace of the proceedings. See *Barker* v. *Wingo*, 407 U.S. 514, 531 (1972). Most significantly, Brown had been scheduled to go to trial in June 1971 with the first group of alleged conspirators, but he requested a severance, which, when granted, led to a substantial delay. Moreover, he demonstrates no constitutionally cognizable prejudice.[13] See id. at 532. Finally, we note that since the Government was ready for trial in June 1971, there was no violation of this circuit's Rules Regarding Prompt Disposition of Criminal Cases, which went into effect shortly thereafter.[14]

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[13] Brown claims only that the delay permitted the Government to call an additional witness. He does not allege that his own preparation was hampered. Moreover, he was free on bail during the two-year period.

[14] The effective date of the Rules was July 5, 1971.

Appellants Brown and Nash argue that the Government failed to establish—as it must under section 174, see *United States* v. *Aqueci*, supra note 5—that they knew that the drugs in question had been illegally imported. This argument ignores the evidence that both appellants were at various times in possession of quantities of heroin. As Judge Mishler charged, this is sufficient to justify an inference that they were aware that it had been illegally imported. See, e.g., *Turner* v. *United States*, 396 U.S. 398, 408-18 (1970).[15]

## V. Miscellaneous Contentions

Finally, appellants offer a number of additional reasons for reversal, including the prosecutor's assertedly prejudicial summation, allegedly improper venue in the Eastern District, and the discovery of "new" evidence with regard to appellant Nash. On the first point, we find that the challenged prosecutorial remarks, when placed in context, are for the most part unobjectionable and that such error as may have occurred was of minor significance. As to venue, the use by the conspirators of John F. Kennedy International Airport for flights to Miami and Detroit to obtain or sell narcotics was a sufficient basis for venue to lie in the Eastern District.[16] With regard to the third

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[15] With respect to cocaine, Judge Mishler charged that an inference of knowledge may be drawn from the proven possession of at least one kilo of the substance during the pendency of the conspiracy. See *United States* v. *Gonzalez*, 442 F.2d 698, 705, 709 (2d Cir.) (en banc), cert. denied, 404 U.S. 845 (1971).

[16] Two such flights were listed in the indictment and proved as overt acts in furtherance of the conspiracy.

point, the evidence in question—hospital and doctor's records showing that Nash had been hospitalized for a few days in late July 1969—would have been of little or no help to appellant's case[17] and, in any event, could have been sought during the pendency of the trial.[18] We have considered the other points raised by appellants, but none warrants further discussion.

**Affirmed.**

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[17] A government witness, Stanton Garland, testified that in "[t]he latter part of July 1969" he saw Nash hand $17,000 to Nash's father (named in the indictment as a co-conspirator), who in turn gave the money to Jesus Torrado, presumably in payment for narcotics. The fact that Nash was in the hospital for a few days in late July scarcely amounts to a refutation of the testimony in question.

[18] A recess of five days was called after Garland had testified. Thus, Nash had ample opportunity to obtain the records when he was already aware of their arguable relevance to the Government's case against him.

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1527

ROBERT BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 72-1531

CLARENCE NASH, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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After a jury trial in the United States District Court for the Eastern District of New York, petitioners—together with Rene Boulier and George Nathan[1]—were convicted of conspiring to receive and sell illegally imported

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[1] Petitions by Boulier and Nathan are pending before the Court as Nos. 72-6486 and 72-6497. The government filed a joint response to those petitions on May 24, 1973.

narcotics, in violation of former 21 U.S.C. (1964 ed.) 174; they were sentenced to ten years' imprisonment and fined $10,000.

In separate petitions, each claims deprivation of his Sixth Amendment right to a speedy trial (Pt. II in both petitions), insufficiency of the evidence establishing knowledge of illegal importation of the narcotics (Pt. III in both petitions), and prejudice from the admission of evidence of post-conspiracy narcotics transactions (Pt. I in both petitions); in addition, Brown claims prejudice from the admission of his business card which had been seized incident to the post-conspiracy arrest of a co-conspirator on unrelated charges (Brown, Pt. I) and from the admission of evidence of his arrest in 1945 for possession of a revolver and knife as rebuttal to character testimony which he offered (Brown, Pt. IV). Nash contends that his motion for a new trial on the basis of newly discovered evidence was improperly denied (Nash, Pt. IV). Except for the evidentiary insufficiency argument and Nash's speedy trial claim, all of these contentions are fully discussed and correctly rejected in the opinion below, upon which we primarily rely. See Pet. App. A9[2] as to Brown's speedy trial claim, Pet. App. A6-A7 as to post-conspiracy evidence, Pet. App. A8 as to Brown's business card, Pet. App. A8-A9 as to Brown's 1945 arrest, and Pet. App. A11 and nn. 17, 18 as to Nash's motion for a new trial.

1. Unlike Brown, Nash did not move in the trial court for dismissal of the indictment on grounds of failure to prosecute; he raised the claim in the court of appeals only by a single sentence appended in a joint

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[2] The pagination in the appendix to each petition (in each case filed separately from the petition itself) is the same.

brief to Brown's lengthier argument on the subject. In any event, the reasons given in the opinion below for denying Brown's claim apply equally to Nash. The delay in regard to both petitioners was due primarily to the fact that both moved for and were granted a severance from a larger group of conspirators who were tried first. Nash, like Brown, has shown no prejudice from the delay. He can hardly blame the government because, during the interim, he failed to keep in contact with his first retained attorney and did not learn promptly of the latter's death; if the withdrawal of his second retained attorney can be attributed to the delay, that is a consequence of his own successful motion for a severance which caused the delay.

2. Brown argues that the evidence of his knowledge of illegal importation was insufficient because he was shown to have possessed less than a half-kilogram of *cocaine* during the term of the conspiracy. Nash argues that the evidence was insufficient because it showed only joint possession with his father. The court of appeals, however, based its holding of evidentiary sufficiency upon evidence that both petitioners at various times were in possession of *heroin* (Pet. App. A10); Nash was shown in at least one instance to have possessed heroin by himself and not jointly with his father (R. 589-590).[3]

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JULY 1973.

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[3] "R." refers to the record in the court of appeals.

DOJ-1973-07

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# Supreme Court of the United States

**OCTOBER TERM, 1972**

**72-1531**

CLARENCE NASH,

*Petitioner,*

—v—

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

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# Supreme Court of the United States

**October Term, 1972**

72-1531

CLARENCE NASH,

*Petitioner,*

—v—

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

Petitioner Clarence Nash prays for a rehearing of a previously denied petition for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 16, 1973. A petition for certiorari was previously denied by this Court on October 9, 1973.

## Previous Applications

All previous applications including opinions and statutes were filed in the original petition for certiorari except that since the filing of the petition for certiorari this Court decided *Strunk* v. *United States*, 93 S.Ct. 2260 (June 11, 1973).

## Stay of the Mandate

No stay of the mandate has been requested as petitioner Clarence Nash has been incarcerated shortly after the mandate issued from the Second Circuit Court of Appeals.

## Reasons for Granting a Rehearing

Petitioner Clarence Nash has been effectively denied due process of law because of the undue delay between his indictment and trial, depriving him of a speedy trial and an ample opportunity to obtain counsel, in violation of his rights under the Sixth Amendment of the United States Constitution. This claim was made in the District Court, repeated in the Circuit Court of Appeals and urged upon this Court in the original petition for certiorari. Petition for certiorari was filed in May, 1973, before this Court decided *Strunk* v. *United States, supra*, and a careful review of the *Strunk* decision and its applicability to this case would indicate that petitioner Nash was indicted in June, 1970, and not tried until June, 1972, and was clearly subject to the full force and opinion set forth by this Court in *Barko* v. *Wingo*, 407 U.S. 514, and reaffirmed in the *Strunk* decision. The difference seems to be that Nash, as was co-petitioner *Brown* (72-1527), was a defendant in a multi-defendant narcotic conspiracy case, whereas *Strunk* was indicted for a stolen car. The principles of law should apply to all defendants regardless of whether or not their convictions were for extremely unpopular charges (*i.e.*, narcotics) or less volatile violations (*i.e.*, auto theft).

## Facts Concerning this Petition

There are no additional facts concerning this petition for a rehearing except that the law seems to have changed and to have been further amplified in favor of the petition since the *Strunk* case. The Solicitor General, in the answering brief, did not mention the *Strunk* case. However, the Court of Appeals seemed to be concerned with the undue delay argument.

## CONCLUSION

**For the foregoing reasons, this petition for a rehearing for a writ of certiorari should be granted.**

JOSEPH I. STONE
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*Member of the Bar of the Supreme Court of the United States*
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## Certification

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-1531

CLARENCE NASH,

*Petitioner,*

—v—

UNITED STATES OF AMERICA,

*Respondent.*

JOSEPH I. STONE affirms as follows:

(1) That I am an attorney duly admitted to the Bar of the Supreme Court of the United States.

(2) That this petition for rehearing is not frivolous in nature and is certainly not meant to delay as the defendant-petitioner is already incarcerated on this judgment of conviction.

(3) That the issue here is an amplification of the undue delay argument set forth by petitioner in the District Court and the Circuit Court of Appeals as enunciated in the Strunk case (*supra*).

Dated: New York, New York
October 30, 1973

/s/ JOSEPH I. STONE
Joseph I. Stone
*Attorney for Petitioner Nash*